IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-875

DONALD RATLIFF, ET AL ..... PETITIONERS

VS:

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT ..... RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion below from the Supreme Court of Kentucky is styled *Donald Ratliff, et al* v. *Lexington-Fayette Urban County Government*, and is reported at 540 S.W.2d 8 (Ky. 1976).

JURISDICTION

Petitioner properly invokes the jurisdiction of this Court under 28 U.S.C. §1257(3) to review the final judgment of the Supreme Court of Kentucky which was

entered on June 25, 1976; petition for rehearing having been denied on October 1, 1976.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution insofar as it states:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

STATUTE INVOLVED

It involves 4 U.S.C. §§105-110, known as the Buck Act, insofar as it states:

"§106. Same; income tax

"(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

ORDINANCE INVOLVED

It involves Lexington-Fayette Urban County Government, Code Section 13-4 (1972), the text of which is set forth in Appendix 1 hereto.

QUESTION PRESENTED

WHETHER ON THE BASIS OF THE RECORD AND ARGUMENTS PRESENTED BELOW, THE DECISION OF THE SUPREME COURT OF KENTUCKY THAT THE LICENSE FEE ADOPTED BY RESPONDENT DOES NOT CONSTITUTE A TAKING OF PETITIONERS' PROPERTY WITHOUT DUE PROCESS OF LAW IS SO CLEARLY IN ACCORD WITH THE DECISIONS OF THIS COURT AS NOT TO WARRANT REVIEW ON CERTIORARI.

STATEMENT

Respondent agrees with the facts recited in the first paragraph of Petitioners' statement, but restates the remaining material facts as follows.

This class action was brought by Petitioners, employees of the Bluegrass Army Depot, a United States military installation located at Avon in Fayette County, Kentucky, seeking to have the occupational license fee ordinance of the Lexington-Fayette Urban County Government declared invalid as to them. Petitioners alleged it deprives them of their property without due process of law. The case was briefed and argued in the Fayette Circuit Court, Lexington, Kentucky, on the motion of the Respondent to dismiss. The Circuit Court dismissed the Complaint because it failed to state a claim upon which relief could be granted, whereupon an appeal was taken to the Kentucky Supreme Court. That Court affirmed the decision of the trial court.

All Petitioners and their class are employees of the Bluegrass Army Depot, a United States military

installation located at Avon, in Fayette County, Kentucky. The depot is owned by the U.S. Government and is self-contained. Respondent presently renders no service within the confines of the establishment. Approximately 3600 persons are civilian employees at the depot. Of that number, Petitioner alleged that 57% or, 2052 persons, reside outside Fayette County. As admitted by Petitioners, all of them use Fayette County roads in going to and from work. (Petition p. 4).

ARGUMENT

THE DECISION OF THE SUPREME COURT OF KENTUCKY THAT THE LICENSE FEE ADOPTED BY RESPONDENT DOES NOT CONSTITUTE A TAKING OF PETITIONERS' PROPERTY WITHOUT DUE PROCESS OF LAW IS SO CLEARLY IN ACCORD WITH THE DECISIONS OF THIS COURT AS NOT TO WARRANT REVIEW ON CERTIORARI.

Petitioners raised for the first time in their Petition for Rehearing in the Supreme Court of Kentucky the existence of the issue that a small portion, approximately 6%, of the military installation lies outside of the boundaries of Fayette County. Under Kentucky procedure it is too late to raise a question for the first time on a Petition for Rehearing in the Supreme Court of Kentucky. Kentucky Rules of Appellate Procedure 1.350; *Howard* v. *Commonwealth*, Ky., 395 S.W.2d 355, 359 (1965). Thus, this issue did not actually arise before, nor was it actually passed upon or decided by, the Kentucky Court. It is well

settled that the question must be actually raised and decided in a State Court in order for this Court to review it on certiorari. *Edelman* v. *California*, 344 U.S. 357 (1953); *Beck* v. *Washington*, 369 U.S. 541 (1962). Accordingly, the issue is not properly before this Court.

However, if it were, it would be of no consequence. As can plainly be seen from the face of the local ordinance, (A.1) the license fee imposed by the Respondent applies only to income earned for work done within the boundaries of the Respondent and when an individual does not earn all of his income within said boundaries there is provision for apportionment.

On the above facts the decision of the Supreme Court of Kentucky was clearly correct, and in accord with the applicable decisions of this Court. This Court has previously ruled that a municipality may levy an occupational license tax on employees of a federal installation located on federally owned property in the municipality. *Howard* v. *Commissioners of Sinking Fund*, 344 U.S. 624 (1953). The opinion below is fully in accord with all previous decisions rendered on this issue. *Kiker* v. *City of Philadelphia*, 346 Pa. 624, 31 A. 2d 289 (1943), *cert. denied*, 320 U.S. 741 (1943); *Sheridanville, Inc.* v. *Borough of Wrightstown*, 125 F. Supp. 743 (D.N.J. 1954), aff'd 225 F.2d 473 (3d Cir. 1955), *cert. denied*, 351 US 962 (1956); *Application of Thompson*, 157 F.Supp. 93 (E.D. Pa. 1957), aff'd, 258 F.2d 320 (3d Cir. 1958), *cert. denied*, 358 U.S. 931

(1959); and *Non-Resident Taxpayers Association* v. *Municipality of Philadelphia,* 341 F.Supp. 1139 (D.N.J. 1971), aff'd, 458 F.2d 456 (3d Cir. 1973).

Congress, by passage of the Buck Act, 4 U.S.C. §106(a), receded to local taxing districts the power to levy a tax upon those deriving income from working on a federal area within the boundaries of the district. *Howard* v. *Commissioners of Sinking Fund, supra.* Inherent in the recession of that power was the transfer of the obligation to the local district to confer all the usual attributes of government upon those deriving income from working on the federal area. *Kiker* v. *City of Philadelphia, supra,* (hereinafter cited as *Kiker*). The fact that the federal government does not at the time in question see fit to take advantage of the obligations of the local authority to make available protection and benefits to persons and property on the federal installation does not justify invalidation of such income tax. *Kiker,* and *Sheridanville, Inc.* v. *Borough of Wrightstown, supra.* Accordingly, when the federal government does not see fit to take advantage of the local authority's obligation to make available protection and benefits, then the privilege of working and earning a living within the boundaries of the local authority is a sufficient benefit in and of itself to warrant the imposition of an occupational license fee.

However, the decision of the Kentucky Supreme Court was not predicated solely upon the rule that the privilege of being employed in the taxing district is a

sufficient benefit to meet the requirements of the Fourteenth Amendment. In addition, as admitted by the Petitioners, the Court noted that the Petitioners in going to and from work received police protection and used roadways built or maintained by the Urban County Government, and the Government furnishes them with public facilities.

This Court has in fact denied certiorari to other parties in substantially identical circumstances as those of the Petitioners herein. In *Kiker* where, as in this case, the plaintiff contended that he received no benefits or protection from the local taxing district and, therefore, that to enforce the provisions of the ordinance under consideration therein upon him was to deprive him of his property without due process of law, the Court held that a civilian employee at the Philadelphia Naval Shipyard and a resident of New Jersey who used a ferry to cross the Delaware River directly to the shipyard and had no contacts with other parts of Philadelphia was not exempt from a net income tax imposed by the City of Philadelphia, and that the imposition of the tax upon him did not deprive him of his property without due process of law.

No decisions have been rendered that are in conflict with the opinion of the Kentucky Court rendered herein. The cases relied upon by Petitioners are distinguishable on their facts. See *Non-Resident Taxpayers Association, supra,* where the Court of Appeals stated:

> "Appellants' due process attack on the ordinance under cases such as . . . *Miller Brothers Co.* v. *Maryland,* 347 U.S. 340, 774 S.Ct. 535, 98 L.Ed. 744 (1954), . . . if we had to consider it, we would regard it as insubstantial."

It is true that in *Miller Brothers Co.* v. *State of Maryland,* 347 U.S. 340 (1954) this Court stated:

> "That due process requires some definite link, some minimum connection, between a State or person or property or transaction it seeks to tax."

However, in that case the State of Maryland was attempting to tax a Delaware corporation which, without any invasion or exploitation of the consumer market in Maryland, sold goods to Maryland inhabitants who traveled from Maryland to Delaware to purchase them. As this Court noted at page 345 of its Opinion, that is far different from saying that Maryland could not have taxed the Delaware corporation if it had done business in Maryland. Likewise, although this Court in *State of Wisconsin* v. *J.C. Penney Co.,* 311 U.S. 435 (1940) stated the test recited by the Petitioners, it held that the substantial privilege of carrying on a business in Wisconson clearly supported the imposition of a tax for the privilege of declaring or receiving dividends out of income derived from property and business located in the state. The facts of *Dane* v. *Jackson,* 256 U.S. 589 (1921) bear no resemblance whatsoever to the facts of the case presently before this Court.

As noted in *Dane* v. *Jackson, supra,* no system of taxation has yet been devised which will return to each taxpayer or class of taxpayers benefits in proportion to the payments made. Many governmental benefits inure more directly to individuals who have occasion to use them. The most notable in this context are the Courts, essential to the rights and liberties of all citizens but directly utilized only by some. The point is, regardless of the extent of the actual use of governmental benefits, the obligation of the Urban County to furnish them is no less at Bluegrass Army Depot than in other areas. A requirement of direct return of benefits, as a basis for taxation would simply mean that government as we know it in this country would cease to exist.

Since the direct equation of taxes with benefits is contrary to reason and authority, it must be rejected; accordingly there was no need for any evidentiary hearing in the Fayette Circuit Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari shculd be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, David W. McLellan, Jr., one of counsel for Respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 25TH day of January, 1977, I served three (3) copies of the foregoing Brief on Charles T. Walters, counsel for Petitioner, 71 South Main Street, Winchester, Kentucky 40391, by mailing same to him postage pre-paid at the above address.

David W. McLellan, Jr.

APPENDIX

APPENDIX 1

Lexington-Fayette Urban County Government, Code

Sec. 13-4. Who must obtain; basis of computation.

Every person engaged in any occupation, trade, profession or other activity in the city shall pay to the city for the purpose of the general fund an annual license fee for the privilege of engaging in such activities, which license fee shall be measured by two per centum (2%) of:

(a) All salaries, wages, commissions and other compensations earned by every person in the city for work done or services performed or rendered in the city; and

(b) The net profits of all businesses, professions, or occupations from activities conducted in the city.

Where salaries, wages, commissions and other compensations under (a) above are earned for work done or services performed or rendered in the city, such license fee shall be computed by obtaining the percentage which the compensation for work performed or services rendered within the city bears to the total compensation earned.

The net profits of business and professions from activities conducted in the city under (b) above shall be computed as follows:

Multiply the entire net profit from all sources by a business allocation percentage to be determined by:

(1) Ascertaining the percentage which the gross receipts of the license from sale or service rendered within the city bears to the total gross receipt from sales or service rendered wherever made.

(2) Ascertaining the percentage which wages, salaries and other personal service compensation for the period covered by the report for services performed or rendered within the city bears to the total wages, salaries and personal service compensation for such period of all the licensee's employees within and without the city.

(3) Adding together the percentages determined in accordance with subparagraphs (1) and (2) above, and dividing the total so obtained by two. (Ord. No. 3583, §1, 12-27-56; Ord. No. 99-72, §1, 5-25-72)

* * * * * * *